

ASCOT INTERNATIONAL PTE. LTD.

a

v.

ELEVIC TRADING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

DATUK K. L. REKHRAJ JC

b

[CIVIL SUIT NO: D2-22-887-94]

3 FEBRUARY 1996

PRACTICE & PROCEDURE: *Summary judgment - Claim by foreign plaintiff for goods sold and delivered - Writ - Claim made in foreign currency without conversion to Malaysian currency - Whether triable issue - Delivery orders not carrying defendants' acknowledgement - Whether triable issue.*

c

The plaintiffs, a Singapore based company, claimed a sum of Singapore \$600,715.27 (without converting that money claim to Malaysian currency) for goods sold and delivered. The plaintiffs proceeded summarily under O. 14 annexing 24 invoices and 24 delivery orders to the affidavit in support.

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The defendants' affidavit in reply denied any receipt of the goods under the delivery orders or that they had ordered any such goods. In amplification the defendants denied having authorised any person to collect the goods from the plaintiffs, or owning the lorries which collected the goods under the related invoices. The defendants also denied that one Lee Soo Keng whose signature appeared on one delivery order was their servant or in their employment. Finally the defendants raised the issue that if it had received the goods the delivery orders ought to have carried acknowledgment of the company.

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The Senior Assistant Registrar took the defence as a bare denial, and consequently gave judgment to the plaintiffs. The defendants appealed.

Held:

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[1] The writ filed in the Malaysian Court by the plaintiffs should have shown the conversion of the Singapore Dollars with the equivalent value in Malaysian currency before filing the writ in Court to crystallize the liability of the defendants in local currency. Purely on this ground, the O. 14 application must be dismissed for want of conversion of the equivalent into Malaysian Ringgit before filing.

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[2] While it is true that the defendants' defence was a general denial to the effect that they have no dealings with the plaintiffs, going by the plaintiffs' affidavits, the defendants could not have done any better other than to challenge the plaintiff to proof thereof the way they did.

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- a* [3] Not a single delivery order was shown to have had any acknowledgement chop of the defendants and/or an acknowledgment by an identifiable person other than one delivery order where a Mr Lee Soo Keng was shown as signatory.
- b* [4] There was a serious question of fact to be tried in the interest of justice as to whether or not the goods were in fact ordered to be purchased by the defendants and if purchased were they in fact supplied, and if supplied, where and by whom were they received.

[Appeal allowed with costs]

- c* **Cases referred to:**
Overseas Chinese Banking Corporation Ltd. v. The Firm of Yaik Joo Ann [1936] MLJ Rep. 88 (**fol**)
Overseas Investment Private Limited v. Anthony William O'Brien & Anor. [1988] 2 CLJ 238 (**refd**)
- d* *Malaysian International Merchant Bankers Berhad v. Datuk Mohd. Salleh & Anor.* [1988] 2 CLJ 90 (**fol**)
Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan [1994] 3 MLJ 530 (**cit**)

Legislation referred to:
Rules of High Court 1980, O. 14

- e* *For the plaintiff - Saran Singh; M/s. Saran Singh & Co.*
For the defendant - Trevor George De Silva; M/s. Shook Lin & Bok.

JUDGMENT

- f* **K. L. Rekhraj JC:**
- The plaintiffs, a Singapore based company in liquidation, filed a claim against the defendants in Malaysia at the High Court at Kuala Lumpur for a claim in the sum of Singapore \$600,715.211 (without in any way converting that money claim in local Malaysian currency).
- g* The claim was for goods sold and delivered over a period running from **20 April 1992 to 30 October 1992** under **24 invoices** and corresponding 24 delivery order for the total value of Singapore \$600,715.27. The plaintiffs proceeded summarily by a summons in chambers under O. 14 (enclosure 4)
- h* which was supported by an affidavit (enclosure 6) of Mr. Nicky Tan Ng Kuang the liquidator appointed for the plaintiff company.
- By paragraphs 5 and 6 of his said affidavit, Mr. Nicky Tan adopted all the 24 invoices and the corresponding delivery orders under which he claimed the defendant had collected all the said goods - annexing the said invoices; and
- i* the corresponding delivery orders marked as exhibit "A" - pages 5 - 51.

By enclosure 8, the defendants filed their defence pleading that they had notified the plaintiffs of their non-receipt and as such they were not indebted to the plaintiffs; and in any event put the plaintiffs to proof of delivery.

The defendants also filed an affidavit dated 9 January 1995 in reply completely denying the averments of the plaintiffs as made in paragraphs 3, 4, 5 and 6 of the affidavit of Mr. Nicky Tan in support of the summons and further denied that they had at any time received the said goods under the delivery orders from the plaintiffs. They also put on record that immediately upon their receipt of a letter from the plaintiffs' solicitors demanding for payment, the defendants' solicitors immediately replied as follows:

our client denies the contents therein. Our client never ordered any such goods from your client; and in any event, let us have copies of all documents (if any).

The defendants in amplification by a further final affidavit (enclosure 18) replied as follows:

by paragraph 2 - I have not at any time authorised any person to collect the said goods from the plaintiffs.

by paragraph 3 - If the said goods were said to have been received by the company, the delivery orders should carry a chop or acknowledgement of the company and the signature of the Director of the defendant company.

by paragraph 4 - I state the Lee Soo Keng is not known to me and neither is he in the employ of the defendants.

by paragraph 4 - I deny that the lorries which collected the goods under the related invoices, belong to the defendants.

The plaintiffs in reply to enclosure 18, then filed a further affidavit (enclosure 19) annexing as exhibits marked "A" - collectively referred to as 122 delivery orders from United Malaysian Gypsum Products Sdn. Bhd. (UMGP) issued not in the name of the defendants; but in favour of the plaintiff company, the first of which delivery order No. 0956 is dated 6 May 1992 and the last of which is identified as No. 126 as dated 3 September 1992 to co-relate that the goods though shown to have been purchased by the plaintiffs from (UMGP) were directly transported/delivered or collected by the defendants.

The defendants by their further affidavit (enclosure 20) denied the contents of enclosure 19, more particularly the receipt of the goods under the 122 delivery orders; and that not a single delivery order over the alleged period of time, carried any chop of the defendant company in acknowledgement of the said delivery orders.

- a* The Senior Assistant Registrar in total disregard to the numerous affidavits filed by both parties, came to the conclusion that as the defence was a bare denial, there were no issues to be tried and accordingly gave judgment as prayed to the plaintiffs. **Thus this appeal.**
- b* Upon hearing the Counsels, I allowed the appeal with costs to be taxed and paid forthwith; and my reasons for allowing the appeal are as follows:
- The plaintiffs' statement of claim is made in foreign currency - being Singapore Dollars. It was held in the case of *Overseas Chinese Banking Corporation Ltd. v. Firm of Yaik Joo Ann* [1936] MLJ Rep. 88 by Terrell J that "when
- c* a statement of claim is endorsed upon a specifically endorsed writ in respect of an amount due upon a foreign judgment; the claim should be expressed in Straits Settlement Currency; and it should show the amount in Straits Settlement which is the equivalent of the amount of the foreign currency due on the foreign judgment, calculated as on the date when foreign judgment was
- d* obtained".
- Relying upon Terrell J's decision I hold that the writ filed in the Malaysian Court by the plaintiffs on 13 October 1994 should have shown the conversion of the Singapore Dollars with the equivalent value in Malaysian currency before filing the writ in Court; to crystalize the liability of the defendants in local
- e* currency; in the face of the continuous exchange loss to the defendant by the fluctuating foreign currency market. Purely on this ground, the O. 14 application for summary judgment must be dismissed for want of conversion of the equivalent value into Malaysian Ringgit before filing.
- f* To oppose an O. 14 application for summary judgment, the defendant must satisfy the Court that there is an **issue** or **question** in dispute to be tried between the parties; or that there ought for some **other reason** to be a trial of that claim. In an action of this nature - for goods sold and delivered - the defendants have pleaded triable/disputed facts by:
- g* (i) filing the affidavits in opposition; and
- (ii) filing a defence - which on the face of it appears to be a bare-denial but in substance a defence.
- h* The defendants' defence was a general denial to the effect that they have had no dealings with the plaintiffs and in any event putting the plaintiffs to proof thereof. They could not have done any better than this; and by their affidavits challenged the plaintiffs to produce the documents to proof of delivery of goods by the plaintiffs to the defendants.
- i* The plaintiffs attempted but failed miserably -

Firstly - The invoices as referred to in paragraph 5 of the affidavit in support of the plaintiffs' application under O. 14 covered a period from **20 April 1992 to 30 October 1992** supported by corresponding delivery orders (25 all in), the deliveries of which are said to have been collected by various lorries - numbers identified; but without a single acknowledgement on the delivery orders from the defendants as to their receipt. a
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Secondly - The plaintiffs by enclosure 19 introduced further contradictory evidence by annexing **122 delivery orders** covering a different period running from **6 May 1992 to 3 September 1992** not being those under claim; to link the transactions having been entered between the plaintiffs as purchasers on the one part and United Malaysia Gypsum Products Sdn. Bhd. as suppliers on the other part; associating the defendants as the receivers of the goods on the 3rd part. c

I have carefully studied each of the 24 invoices and the 146 delivery orders as annexed to the affidavits, and not a single delivery order was shown to have had any acknowledgement chop of the defendants and/or an acknowledgment by an identifiable person other than in one case on delivery order No. 9046 (enclosure 6 exhibit A at page 33) where a Mr. Lee Soo Keng, NRIC No. 8120225 is shown as the signatory. The defendants by enclosure 18 at paragraph 4 completely denied that the said Lee Soo Keng was their servant and/or in their employment. d
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I find that there is no challenge by the plaintiffs; and neither have the plaintiffs produced the purchase orders, if any, in support of their claim.

Order 14 application is basically decided on affidavit evidence regardless of the defence; and where there is a bare defence, then O. 18 r. 19 is the route to judgment by striking it out. f

Justice M. Shankar in the case of *Overseas Investment Private Ltd. v. Anthony William O'Brien & Another* [1988] 2 CLJ 238 said, "where there is a case to be decided on a contest of affidavits, material allegations which are not contradicted are deemed to be admitted". g

Again Tan Sri Justice Gunn Chit Tuan (then Judge) in the case of *Malaysian International Merchant Bankers Berhad v. Datuk Mohd. Salleh & Anor.* [1988] 2 CLJ 90 at page 95 said, "Since there is, *albeit*, only one triable issue, nevertheless, I considered that this was not an appropriate case for leave to be granted to enter final judgment by summary procedure under O. 14 of the Rules of High Court, 1980; and for that reason dismissed the appeal with costs". h

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- a* I see here a serious question of fact to be tried in the **interest of justice** as to whether or not the goods were infact ordered to be purchased by the defendants and if purchased were they in fact supplied; and if supplied, where and by whom were they received? This is an issue that goes to the root of the substance of the plaintiffs' claim; and the defendants' denial, more for the
- b* fact that the plaintiffs have failed to produce any **acceptable documentary evidence** in acknowledgement of the goods by the defendants. The Court, in the interest of justice will have to explore to trial, and not shut the doors to the defendants. I accordingly allowed the appeal in the name of justice with costs to be taxed to the appellants/defendants to be paid forthwith by the respondents/plaintiffs.

- c* Further, I held that the plaintiffs ought to have known that their chances of success on the **only evidence** in their possession, produced to Court in support of the O. 14 application was far too short of that as was required on such an application. They ought to have known that they had a weak case as on
- d* record, but nonetheless the plaintiffs' Counsel thought it fit to read to the Judge that part of the passage in the case of *Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan* [1994] 3 MLJ 530 at page 535 where Justice Abdul Malik Ishak said "one would not only be able to see the wood from the trees but also the moon in the darkness of the night". The plaintiffs' Counsel in his last bid invited
- e* the Court to permit him to refer one by one to all the related invoices and delivery orders so that **the wood and the moon** could be clearly seen. Alas! at a sheer cost of prime judicial time, I discovered the "trees" and "the darkness of the night". The said judicial time could have been put to better use in the clearing of the many back-log of cases that are awaiting trial, but
- f* for this frivolous interlocutory application.

- g* I am conveniently reminded at this time of what Lord Goddard (LCJ) said in the case of *Pocock v. A.D.A.C.* at page 34 "I wish it to be known as a practice rule that the proper course for a master to take if he considers that where in a summons under O. 14, and it is clear that the plaintiff knows that there was an arguable defence on the claim, is to **dismiss the summons with costs** - masters should use their powers under O. 14 **much more freely** and on that note I ordered costs to be taxed and paid forthwith.

Reported by Jasmesh Kaur

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